

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SALEH AHMED,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 07-0411
	:	
v.	:	
	:	
ROBERT MUELLER, Director,	:	
Federal Bureau of Investigations, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

AND NOW, this 14th day of September, 2007, upon consideration of Defendants' Motion to Dismiss, it is hereby ORDERED that the Motion is GRANTED for the reasons that follow.

Saleh Ahmed ("Plaintiff") brings this action against Robert S. Mueller, Director of the Federal Bureau of Investigations (FBI), Michael Chertoff, Secretary of the Department of Homeland Security (DHS), Emilio Gonzalez, Director of the U.S. Citizenship and Immigration Services (USCIS or "the Service"), Donald Monica, District Director of USCIS in Philadelphia and Unknown US Federal Government Agency or Agencies who have responsibility for conducting security records checks in immigration-related matters in connection with his application for naturalization. Plaintiff asks this court to conduct a hearing on his naturalization application to determine whether he should be scheduled for an oath ceremony and receive his U.S. citizenship. Alternatively, Plaintiff requests that this court direct the defendants to schedule an interview on his naturalization application and issue a decision within 30 days thereafter. Plaintiff avers that this court has jurisdiction pursuant to 8 U.S.C. § 1421(c), 8 U.S.C. § 1447(b)

and 28 U.S.C. § 1331.

Before this court is Defendants' Motion to Dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1) in which they argue that this court lacks subject matter jurisdiction to provide the relief requested. Plaintiff opposes Defendants' motion and argues that this court does have subject matter jurisdiction.

A. Factual Background

Plaintiff is an adult male from Yemen who filed an application for naturalization on August 30, 2005. (Pl.'s Compl. ¶¶ 1, 15.) On September 7, 2005, Plaintiff received a Fingerprint Notification and he was fingerprinted shortly thereafter. (Pl.'s Compl. ¶ 15.) An interview was scheduled to take place on March 3, 2006. (Pl.'s Compl. ¶ 15.) Plaintiff received a notice dated February 12, 2006 informing him that his March 3, 2006 interview was cancelled due to "unforeseen circumstances". (Pl.'s Compl. ¶ 16.) On May 25, 2006 Plaintiff's counsel sent a letter to USCIS inquiring as to the reason the interview was cancelled and requesting a new interview date. (Pl.'s Compl. ¶ 16.) USCIS did not respond. (Pl.'s Compl. ¶ 16.) Plaintiff requested an INFOPASS appointment for August 15, 2006, and an immigration officer responded that the application was still pending name checks with the FBI. (Pl.'s Compl. ¶ 16.) Plaintiff's counsel sent a letter to USCIS on November 22, 2006 asking for the status of the application. (Pl.'s Compl. ¶ 17.) USCIS responded with a letter indicating that Plaintiff's application was still pending, that background checks were outside the agency and that "these final checks can delay your case for an undetermined amount of time." (Pl.'s Compl. ¶ 17.) Plaintiff filed his complaint in this court on January 31, 2007, at which point his application had

been pending for 17 months.

B. Standard for a Motion to Dismiss

When considering a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and the motion is a facial challenge, the court shall review “whether the allegations on the face of the complaint, taken as true, allege facts sufficient to invoke” this court’s jurisdiction. Turicento, S.A. v. American Airlines, Inc., 303 F.3d 293, 300 (3d Cir. 2002)(internal citations omitted); see also Gould Electronics, Inc. v. U.S., 220 F.3d 169, 176 (3d Cir. 2000).

C. Naturalization Application Process

Applying for naturalization through the USCIS involves several steps. First, an applicant must submit an application for naturalization. 8 U.S.C. § 1445(a). Second, a USCIS employee conducts a personal investigation of the applicant. 8 U.S.C. § 1446(a). Third, the FBI conducts a criminal background check of the applicant. 8 C.F.R. § 335.2(b). Fourth, a USCIS employee conducts an examination, or interview, of the applicant. 8 U.S.C. § 1446(b); El-Daour v. Chertoff, 417 F. Supp. 2d 679 (W.D. Pa. Aug. 26, 2005)(finding that the “examination” refers to the interview of an applicant). Finally, there is a determination whether the application should be granted or denied. 8 U.S.C. § 1446(d). If the application is granted, the applicant participates in a citizenship oath ceremony. 8 U.S.C. § 1448(a); Khan v. Frazier, Civil No. 06-1560 (MJD/RLE), 2007 WL 270413, at *3 (D. Minn. Jan. 29, 2007).

D. Request for Court Hearing

Plaintiff first requests that this court conduct a hearing on his naturalization application to determine whether he should be scheduled for an oath ceremony and receive his U.S. Citizenship. He argues that 8 U.S.C. § 1447(b) and § 1421(c) of the Immigration and Nationality Act (INA) give this court the authority to afford this relief.

1. Section 1447(b)

Plaintiff alleges that USCIS's failure to adjudicate his application violates 8 U.S.C. § 1447(b) of the INA. Section 1447(b) provides that:

If there is a failure to make a determination under section 1446 of this title before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter.

This court finds that the “examination” referenced by § 1447(b) and other sections of the INA denotes the interview of an applicant and not the entire process which includes investigation and criminal background check. See, e.g., El-Daour, 417 F. Supp. 2d at 683. Plaintiff concedes that there has been no interview. (Pl.’s Opp. Mot. Dismiss 1.) On these facts, the court concludes that section 1447(b) does not grant this court jurisdiction to hold a hearing on the matter, determine the matter or remand the matter to USCIS.

2. Section 1421(c)

Count I of Plaintiff’s complaint avers that § 1421(c) of the INA provides for judicial

review of a naturalization application if there is inaction on the application. Section 1421(c), captioned “Judicial Review”, provides that:

A person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such a denial before the United States district court . . . Such review shall be de novo and the court shall make its own finding of fact and conclusions of law and shall, at the request of the petition, conduct a hearing de novo on the application.

Having reviewed the facts as alleged in the complaint, the court concludes that it does not have jurisdiction under § 1421(c) to conduct a de novo review of Plaintiff’s application. Plaintiff alleges that the delay in processing has resulted in a constructive denial of the application. Even if the court found that to be the case, an issue it declines to address, it is clear that § 1421(c) does not predicate district court jurisdiction on mere denial of a naturalization application. The exercise of jurisdiction requires that an application for naturalization have been denied after a hearing before an immigration officer under 1447(a). Section 1447(a) is captioned, “Request for hearing before an immigration officer”. It states that: “If, after an examination under section 1446 of this title, an application for naturalization is denied, the applicant may request a hearing before an immigration officer.” 8 U.S.C. § 1447(a). Plaintiff has not yet been interviewed. There has been no hearing before an immigration officer as provided by § 1447(a) resulting in denial or constructive denial of Plaintiff’s application. Section 1421(c) is simply inapplicable to the facts as alleged in Plaintiff’s complaint, and is insufficient to confer jurisdiction upon this court to conduct a de novo review of Plaintiff’s naturalization application or to review the alleged delay in the processing of his application.

E. Request for Court Order Directing Federal Agencies to Schedule Interview on Naturalization Application.

In the alternative, Plaintiff requests that this court enter an order directing the defendant federal agencies to schedule an interview of Plaintiff regarding his naturalization application and to render a decision on the application no later than 30 days after the interview. Plaintiff attempts to establish subject matter jurisdiction pursuant to the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 701 et seq., and the mandamus statute, 28 U.S.C. § 1361. Defendants argue that this court lacks jurisdiction to consider Plaintiff’s claim. **The court agrees.**

1. The APA

The APA provides for a right of judicial review of agency action to a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. Judicial review of agency actions applies, “according to the provisions thereof, except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion.” 5 U.S.C.A. § 701(a). Section 706(1) permits a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).¹

The United States Supreme Court has made it clear that not all agency action can be compelled but that “the only agency action that can be compelled under the APA is action legally *required*.” Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004)(emphasis in original).

¹ The APA alone does not confer subject matter jurisdiction. Califano v. Sanders, 430 U.S. 99 (1977). In combination with 28 U.S.C. § 1331, however, the APA gives a district court jurisdiction to compel agency action unreasonably delayed or denied. See, e.g., Elhaouat v. Mueller, Civil Action No. 07-632, 2007 WL 2332488, at *3 n.5 (E.D. Pa. Aug. 9, 2007) (citing Kim v. Ashcroft, 340 F. Supp. 2d 384, 388 (S.D.N.Y. 2004)).

A claim brought under § 706(1) “can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.” Id. at 64 (emphasis in original). The Government argues that this court lacks subject matter jurisdiction over Plaintiff’s claims because there is no legally required, non-discretionary duty that defendant agencies are required to take, as there is no time prescribed by the governing statutes and regulations in which USCIS must schedule an interview of an applicant. Plaintiff disagrees, and argues that this court does have subject matter jurisdiction under the APA because the Government is required to adjudicate applications for naturalization under the INA. (Pl.’s Opp. Mot. Dismiss 2.) Therefore, the issue presented to this court is whether Plaintiff asks this court to compel USCIS or the other defendant agencies to perform an agency action that it is required to take.

Many district courts have confronted the question of whether there is a non-discretionary duty to with respect to applications in immigration matters ranging from adjustment of status to naturalization. Some courts have attempted to answer the question framed as whether a plaintiff has a right to have his or her application adjudicated, or adjudicated within a reasonable time. Not all have reached the same conclusion. See, e.g., Elhaouet v. Mueller, Civil Action No. 07-632, 2007 WL 2332488, at *3 (E.D. Pa. Aug. 9, 2007) (finding that USCIS regulations indicate that it has a mandatory, non-discretionary duty to adjudicate naturalization applications); Kaplan v. Chertoff, 481 F. Supp. 2d 370, 399 (E.D. Pa. 2007) (finding that USCIS has a “mandatory non-discretionary obligation to adjudicate such applications within a reasonable amount of time.”); cf. Qui v. Chertoff, 486 F. Supp. 2d 412 (D.N.J. 2007) (determining that immigration officials do not have a non-discretionary duty to adjudicate adjustment of status applications); Badier v. Gonzalez, 475 F. Supp. 2d 1294 (N.D. Ga. 2006) (concluding that the court cannot

exercise jurisdiction under the APA or the mandamus statute because the defendant has no clear duty to act on naturalization application); Zahani v. Neufeld, No. 6:05 CV 1857 ORL 18J, 2006 WL 2246211 (M.D. Fla. June 26, 2006) (finding 8 C.F.R. § 103.2(b)(18) provides USCIS with discretion to withhold adjudication of adjustment of status petition). In a matter concerning an application for adjustment of status, this court previously found that it did not have subject matter jurisdiction over claims brought under the APA and mandamus statute. See Elzerw v. Mueller, Civil Action No. 07-00166, 2007 WL 1221195 (E.D. Pa. April 23, 2007) (Giles, J.). Other courts have attempted to answer whether a plaintiff has “the clear right to an immediate (or even expedited) adjudication of [his] petition and application.” Mustafa v. Pasquerell, No. Civ.SA05-658-XR, 2006 WL 488399, at *4 (W.D. Tex. Jan. 10, 2006). This court, however, finds that the appropriate question, based on the facts of this case as alleged and the relief requested, is whether defendants have a non-discretionary duty immediately to schedule the interview of an applicant.

It is clear from the Service’s own regulations that each individual who submits an application for naturalization shall appear before a USCIS employee for an interview. 8 C.F.R. § 335.2(a). The regulations also require the completion of a criminal background check before such an interview is scheduled:

The Service will notify applicants for naturalization to appear before a Service officer for initial examination on the naturalization application only after the Service has received a definitive response from the Federal Bureau of Investigation that a full criminal background check of an applicant has been completed.

8 C.F.R. § 335.2(b) (emphasis added); see also Pak v. Gonzales, Civil Action No. 07-282, 2007 WL 2306875 (D.N.J. Aug. 6, 2007). Furthermore, Congress has prohibited USCIS from

processing applications until it receives a completed FBI background check. Kaplan, 481 F. Supp. 2d at 379 (citing Pub. L. No. 105-119, 111 Stat. 2448 (Nov. 26, 1997)). The regulations do not require that an interview be held or scheduled within any specific period of time after USCIS receives notice that the FBI has completed its criminal background check of the applicant. Further, the court has found no authority to require the FBI to conduct its criminal background check of the applicant within any specific time frame. Where governing statutes and regulations require adjudication of an application for naturalization within a certain time frame, Norton is clear that a court can compel agency action. Norton, 542 U.S. at 65 (“Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency’s discretion, a court can compel the agency to act, but has no power to specify what the action must be.”).

After Plaintiff’s interviews were cancelled, an immigration officer told him that his application was pending name checks with the FBI. (Pl.’s Compl. ¶ 16.) In November 2006, after asking for the status of his application, USCIS informed Plaintiff that his application was still pending and that the background checks were outside of USCIS. (Pl.’s Compl. ¶ 17.) The USCIS does not have a non-discretionary duty to conduct an interview of applicant when the FBI has not yet completed his background check since the regulations allow an interview to be scheduled only after the criminal background check is complete. See Kaplan, 2007 U.S. Dist. Lexis 22935, at *80 (holding that USCIS “does not have a mandatory duty to take action on an application for naturalization until the FBI has completed its background check.”).² As a result,

² The court’s citation to the Kaplan matter for this proposition does not suggest that it also finds that there is a mandatory duty to adjudicate naturalization applications, as the court in Kaplan concluded.

this court lacks subject matter jurisdiction over Plaintiff's claim for relief under the APA.

In reaching this conclusion, the court declines to find, as Plaintiff urges, that alleged delay of the defendant agencies is a sufficient pleading of constructive failure to act. Plaintiff has been told by a USCIS official on multiple occasions that his application is pending and that his background checks are outside of the agency. Despite his allegation that Defendants' delay is equivalent to a failure to act, Plaintiff's complaint also states that "[i]t is counsel's experience that security clearance delays are often attributable to mundane or easily rectifiable issues such as confusions of names and identities. These issues are not given priority by the FBI or other agencies, even though resolution is a ministerial act and not time consuming." (Pl.'s Compl. ¶ 14.)

Plaintiff does not, in fact, allege a complete failure to act on his application, but a failure by USCIS to cause the FBI to prioritize or expedite his security check. USCIS has explained that Plaintiff's file is pending name checks with the FBI and that the FBI's completed criminal investigation is a necessary step before an interview can be held before the USCIS. It is obvious to this court that considerable excusable time could elapse for background checks to be completed, especially if the FBI has to contact and scrutinize other countries' records and investigations. Delays in the name check process may also be due to the fact that names must be checked phonetically, which is an essential part of the process when names have been transliterated from another language. (Cannon Decl. 4:26-5:1.)

The court understands that Plaintiff may be frustrated by the pace at which his application is currently processing and the repeated scheduling and cancelling of the interview. This is

insufficient to confer jurisdiction upon this court.³ The court cannot inquire into the specifics of the investigation and criminal background check.

The court reads Plaintiff's complaint as requesting relief in the form of an order directing USCIS to schedule an interview on his naturalization application and issue a decision within 30 days of the interview. The court does not understand the relief requested to include a court order directing the FBI to expedite its criminal background investigation of applicant. We make no findings as to whether this court would have subject matter under the APA of such a claim.⁴

2. Mandamus

The mandamus statute, 28 U.S.C. § 1361, provides that the "district courts shall have original jurisdiction in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Mandamus is available as

³ Plaintiff's frustration over the pace of the processing of his naturalization application is "better addressed to the political branches." Yan v. Mueller, Civil Action No. H-07-0313, 2007 WL 1521732, at *2 n.9 (S.D. Tex. May 24, 2007)(quotation omitted). It may be that additional funding to USCIS and the FBI would decrease the amount of time required to process applications for naturalization and other immigration-related matters. Id.

⁴ Courts that have faced the question of whether the FBI has a non-discretionary duty to complete criminal background checks of individuals having submitted applications to USCIS have reached different conclusions. See Kaplan, 481 F. Supp. 2d at 399 (finding Congress has imposed a mandatory duty on the FBI to conduct background checks when applications for adjustment of status and naturalization have been filed with the USCIS); cf. Yan v. Mueller, Civil Action No. H-07-0313, 2007 WL 1521732 (S.D. Tex. May 24, 2007)(noting Congress has not imposed a deadline for the FBI to complete name check investigation and finding that the pace required to complete that investigation is not subject to review under mandamus and the APA); Shalabi v. Gonzalez, No. 4:06CV866 RWS, 2006 WL 3032413, at *5 (E.D. Mo. Oct. 23, 2006) (finding plaintiff could not establish that the FBI owes him a clear, nondiscretionary duty as no statute or regulation imposes a deadline for the FBI to complete a criminal background check).

an extraordinary remedy “for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty.” Heckler v. Ringer, 466 U.S. 602, 616 (1984) (citations omitted). As the APA also requires a non-discretionary duty, the court finds that the analysis of whether mandamus relief is available is the same as whether relief is available under 706(1) of the APA. The court concludes that there is no non-discretionary duty to schedule an interview on a naturalization application when the FBI has yet to complete its criminal background investigation of the applicant. As such, subject matter jurisdiction does not exist under the mandamus statute.

F. Conclusion

Having determined that it does not have subject matter jurisdiction under 8 U.S.C. § 1447(b), 8 U.S.C. § 1421(c), the APA or the mandamus statute, this court finds that Defendants’ Motion to Dismiss must be granted. It is so ordered.

BY THE COURT:

S/ James T. Giles

J.